182

Nos. 10-929/10-931/10-932

Supreme Court, U.S.
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In The

Supreme Court of the United States

DENNIS DAUGAARD, Governor of South Dakota, et al.,
Petitioners,

v.

YANKTON SIOUX TRIBE, et al.,
Respondents.

SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT,
Petitioner,

v.

YANKTON SIOUX TRIBE, et al.,
Respondents.

PAM HEIN, State's Attorney of Charles Mix County, South Dakota, et al.,
Petitioners,

v.

YANKTON SIOUX TRIBE, et al.,
Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF FOR COLIN SOUKUP, REPRESENTING THE FRANK SOUKUP FAMILY LIMITED PARTNERSHIP, AND DAN CIMPL IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

TIMOTHY R. WHALEN
WHALEN LAW OFFICE, P.C
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
E-mail: whalawtim@cme.coop
Attorney for Amicus Curiae Colin Soukup, representing the Frank Soukup Family Limited Partnership, and Dan Cimpl

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF *AMICI* LANDOWNERS	1
A. Hostilities of the USA/YST toward the landowners	1
B. Historical aspects of landowners' interests	4
ARGUMENT	9
A. Impact upon the landowners	9
1. Justifiable expectations of the landowners	9
2. Effects of the litigation on the landowners	11
3. Adverse alteration of the status quo	14
a) Landowner rights	14
b) Criminal jurisdiction	17
c) Insurance and marketability issues	19
B. Discriminatory effect of *Podhradsky*	21
C. Conflicts of the decisions	24
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES:

Bruguier v. Class, 599 N.W.2d 364 (1999) 11

DeCoteau v. District County Court, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) 25

Hagen v. Utah, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) 9

Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) 7

Plains Commerce Bank v. Long Family Land and Cattle Company, Inc. et al., 554 U.S. 316, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008) 7

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977) 9

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) ...*passim*

State v. Greger, 559 N.W.2d 854 (S.D. 1997) 24

Strate v. A-1 Contractors, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997) 7, 22

Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999) 24

Yankton Sioux Tribe v. Podhradsky, 577 F.3d 951 (8th Cir. 2009) (original opinion) 4, 5

Yankton Sioux Tribe v. Podhradsky, 606 F.3d 994 (8th Cir. 2010) (amended opinion) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 890 F.Supp. 878 (D.S.D. 1995) 12

Yankton Sioux Tribe v. United States Corps of Engineers, 606 F.3d 895 (8th Cir. 2010) 24

STATUTES:

18 U.S.C. § 1151 ..... 5, 13

18 U.S.C. § 1151(a) 5, 7

INTERESTS OF *AMICI* LANDOWNERS[1]

The representative landowners in this matter are Colin Soukup, representing the Frank Soukup Family Limited Partnership, and Dan Cimpl. The original *amici* landowners in the trial court and United States Eighth Circuit Court of Appeals were Leonard Kreeger, Colin Soukup, representing the Frank Soukup Family Limited Partnership, Mark Van Duysen and Dan Cimpl; however, two of the original *amici* landowners requested that their name be removed from this brief due to hostile actions attributable to the Bureau of Indian Affairs (BIA) and the Yankton Sioux Tribe (YST).

A. Hostilities of the USA/YST toward the landowners.

There have been arguments asserted in the lower Courts by the USA and the YST that *Podhradsky* will not change the relationship between the Indian and non-Indian citizens of Charles Mix County. *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010). This is not true. A prime example of the YST and BIA hostility is as follows:

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Written consent of all parties accompanies this brief. No counsel for a party authored any part of this brief. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Only the identified *amici curiae* made monetary contributions and funded the preparation and submission of this brief.

The representative landowners on the three most recent *amicus curiae* briefs filed in the lower court were Leonard Kreeger, Colin Soukup, Representing the Frank Soukup Family Limited Partnership, Mark Van Duysen and Dan Cimpl. All of the initial representative landowners or their immediate family members leased land from the YST and had done so for numerous years. One landowner and his family had leased land from the YST for approximately 70 years. Generally, the BIA engages in a process for the lease of the YST land whereby the current tenant of the land executes a document entitled "Allotted Land Request For Negotiated Lease" (Request) and sets forth on the Request the amount of rent he is willing to pay for the property. The YST either accepts or rejects the Request. If the Request is accepted, it is then signed by the YST, the BIA and the landowner. After the Request is signed, a lease is then required to be signed by the YST and the landowner and thereafter approved by the BIA Superintendent. This process was followed with regard to YST property leased by the representative landowners, as well as other affected landowners for numerous years. In accordance with the above process, each of the landowners had submitted a Request and the YST and BIA had approved same. In certain instances, the landowner and the YST had already signed the leases, but approval from the BIA was pending.

This process had occurred several weeks before the *amicus curiae* briefs were to be filed in the Eighth Circuit. After the filing of the final *amicus curiae*

brief in the Eighth Circuit, the leases for the YST land that had been awarded to certain landowners who participated in or supported the *amicus curiae* efforts were revoked by the BIA Superintendent, Ben Kitto. When Mr. Kitto was approached by certain landowners regarding a reason for the delay in the issuance of their leases, Mr. Kitto advised that their leases would not be forthcoming for the sole reason that the representative landowners filed briefs in support of the State of South Dakota and Charles Mix County in this litigation. As a result of the revocation of their leases, the YST property was to be offered for bid in a competitive bidding process. The landowners were further advised by Mr. Kitto that, even if they submitted the high bid under the new bidding process, because of their participation in the litigation, they would not be awarded the lease for the YST property.

It was made abundantly clear to the representative landowners that unless they stopped supporting the State of South Dakota and Charles Mix County in this litigation, the YST and the BIA would impose financial punishment upon them in perpetuity. Given the sovereign immunity of the YST, the landowners were left without a legal remedy and without an opportunity to redress the patently wrongful and malicious conduct of the YST and the BIA. The vindictive conduct of the YST and the BIA was not limited to landowners who participated in the litigation, but also extended to those landowners who the YST and BIA discovered had contributed financial support to the representative landowners in this litigation.

The above conduct was brought to the attention of Ken Salazar, Secretary of the Interior; however, no response nor remedial action was taken by the USA, the BIA or the YST. Consequently, the representative landowners on this brief have been reduced to two since the financial consequences suffered by the other *amici* landowners was so severe that it caused them to withdraw their names from this brief.

Other relationships with Indian individuals and the YST previously enjoyed by the landowners personally or through their businesses have been damaged if not completely destroyed. The net effect of this litigation and the fallout associated therewith is that it has created hostility, anger and vindictiveness because of the legal maneuvering by the USA and the YST and the failure on the part of the Courts to resolve in a conclusive manner the issues herein. *See*, State of South Dakota's Petition for Writ of Certiorari, at 35-40. A resolution must be reached or the tension and angst associated with this case will continue.

The landowners submitting this brief represent not only themselves, but also numerous other landowners who are similarly situated.

B. Historical aspects of landowners' interests.

In *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. Aug. 25, 2009) the United States Court of Appeals for the Eighth Circuit held, among other things, that all lands acquired by non-Indians from

Indian persons subsequent to the enactment of 18 U.S.C. § 1151 on June 25, 1948, were reservation lands under § 1151(a). This decision also created mini reservations under § 1151(a) by placing boundaries around certain trust lands located within Charles Mix County.

The Eighth Circuit amended its opinion in the *Podhradsky* case pursuant to an Order on Petitions for Rehearing which was entered by the Court after petitions for rehearing and review of the original opinion had been filed by the State of South Dakota and Charles Mix County. *See*, State of South Dakota's Petition for Writ of Certiorari, App. 1 and 52. The main modification to the original *Podhradsky* opinion was to remove footnote number 10. *See*, *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010). It seemed apparent from the Order on Petitions for Rehearing that the Eighth Circuit intended to down play the impact regarding the status of lands acquired by non-Indians after June 25, 1948. Although the amended opinion removed footnote 10, the operative language within the original opinion remained and the concerns of the various landowners regarding the status of their lands has not changed. Moreover, the language in the amended opinion clearly provides the rationale for the declaration of the post-1948 fee lands as reservations.

All of the landowners have an interest in lands that were acquired by them or their grantors after the enactment of 18 U.S.C. § 1151 on June 25, 1948. Most of the landowners affected by the amended

Podhradsky decision engage in farming or ranching or other agricultural related businesses on their property. Certain landowners have passed their ownership interests to their family members over the years with the hope to see their family farms continue to exist in the same fashion as their ancestors. Other landowners have commercial businesses on affected property or have housing interests thereon. The decision rendered in the amended opinion in *Podhradsky* adversely impacts the rights and privileges of the parties as well as the citizens, cities, governmental subdivisions, and entities in Charles Mix County, but it has a particularly severe impact on the landowners. The impact on the landowners is to such an extent that they believe that their interests must be considered by the United States Supreme Court as it determines whether or not to grant the Petitions for Writ of Certiorari filed by the State of South Dakota, Charles Mix County and Southern Missouri Recycling and Waste Management District.

In addition to the above, the *Podhradsky* decision has a discriminatory effect on the landowners in at least two significant ways. First, many of the landowners receive utility services in Charles Mix County from Charles Mix Electric Association, Inc. (CME), a rural electric cooperative, and Randall Community Water District (RCWD), a political subdivision of the State of South Dakota. The decision impacts these local utility companies since under the current federal regulatory scheme and federal case law, civil and regulatory jurisdiction of an Indian Tribe is directly

linked to the status of the land. If the land is determined to be Indian Country under 18 U.S.C. § 1151(a) due to its reservation status, then the YST will assert civil and regulatory authority over entities who are present on or engage in business on the § 1151(a) reservation land. *See*, *Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc. et al.*, 554 U.S. 316 (2008). CME and RCWD provide utility services to the affected landowners, as well as Indians and non-Indians who reside on and off the newly created § 1151(a) reservation lands. Since the YST asserts regulatory authority over the above entities on § 1151(a) reservation lands, it may claim a right to regulate the utility rates, enforcement procedures, and other aspects of the utility providers' services to Indian persons on said reservation lands. Moreover, given the status of the governing case law, the YST can disregard the in-house rules, by-laws and regulations of CME and RCWD and, to a certain degree, the federal regulations that govern the above entities. *See*, *Plains Commerce Bank*, 554 U.S. at 329-330. The net effect is that the landowners and other non-Indian customers will be treated differently than Indian customers who receive the same utility services from the above entities and thereby suffer a discriminatory effect from the impact of the *Podhradsky* decision.

Secondly, many of the *amici* landowners reside in the Wagner School District and send their children to

the Wagner public schools. The *Podhradsky* decision impacts the Wagner School District due to the fact that the school is situated on property acquired after 1948. Since the Wagner School system is now on YST reservation land, Indian students will be subject to the jurisdiction of the YST and its tribal courts with regard to certain matters that occur in school. Consequently, the YST arguably will be able to impose upon the Wagner School system its requirements for student discipline and other matters associated with the operation of the school.

In addition, the creation of reservations on the post-1948 fee lands under the *Podhradsky* decision will subject the landowners to civil and criminal jurisdiction by the YST which did not exist before.[2] Further, as a result of *Podhradsky* and the attitude adopted by the YST and the BIA, many of the landowners have suffered financially.

Finally, the Court's amended decision in *Podhradsky* leaves a clear conflict with the decisions rendered by this Court and the South Dakota Supreme Court and begs for a resolution of the issue left undecided in the *Yankton* case. *See, South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). Consequently, it is important that this Court resolve not

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[2] After the 1995 decision by the District Court and the decision by the Eighth Circuit, jurisdiction was changed for a period of time until these decisions were reversed by the United States Supreme Court in the *Yankton* case.

only the injustice suffered by the landowners, but also the conflicts with the *Podhradsky* decision due to the Eighth Circuit's refusal to adhere to the doctrine of *stare decisis*.

ARGUMENT

A. Impact upon the landowners.

The landowners in the area affected by the *Podhradsky* decision have been devastated, once again, by an unfair, unprecedented, and unjust decision by the Eighth Circuit.

1. Justifiable expectations of the landowners.

In Indian jurisdiction cases, courts are required to consider in depth the justifiable expectations of the people impacted by the court's decision and these expectations should not be ignored or simply swept aside. *See*, *Hagen v. Utah*, 510 U.S. 399, 421 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977). The Eighth Circuit's Order on Petitions for Rehearing indicated, in part, that the basis for the modification of the original *Podhradsky* decision regarding the lands acquired after June 25, 1948, was to give due regard to the justifiable expectations of the people impacted by the Court's original decision. The amended opinion, however, fell far short of accomplishing this goal and the justifiable expectations

of the landowners was clearly ignored and swept aside.

Moreover, the historical aspect of the area subject to the litigation in *Podhradsky* was largely ignored by the Eighth Circuit in favor of a decision that adversely impacted the landowners. The South Dakota Supreme Court, following the lead from this Court in *Yankton*, recognized that a court cannot

> . . . ignore the palpable reality that, as the years passed after the 1895 opening, no one behaved as if the reservation remained in existence, not the Federal Government, not the Yankton Sioux, not the State, not the homesteaders, not the townspeople. However carefully we may pore over the thousands of words in treaty negotiations, in chronicles, in agency reports, in statutes, in latter day scholarly exegesis, we cannot ignore the historical actuality of what happened following the opening. The area was utterly transformed. . . . Following a recurrent theme, first came the settlers, then the railroads, then the towns, and businesses. This precipitous change in regional character is undeniable. If not dispositive of the question, it certainly has a persuasive bearing on our decision. . . . With the opening of the reservation came law and order administered by the State, with few exceptions. . . . No distinction was made between ceded lands and allotted lands that passed out of Indian hands. The "single most salient fact [relating to later jurisdictional history] is the unquestioned

> actual assumption of state jurisdiction. . . ." . . . In Yankton Sioux Tribe, the Supreme Court considered this factor influential: "The State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing unchallenged to the present day, further reinforces our holding." . . .

Bruguier v. Class, 599 N.W.2d 364, 375-376 (1999), citing *Yankton*, 522 U.S. at 356-357, and *Rosebud Sioux Tribe*, 430 U.S. at 603. Clearly, the justifiable expectations and the understanding of the parties who resided in the area subject to reservation litigation is critical to a fair and just decision by any appellate court.

In addition, the amended opinion left the impact of the original opinion virtually unchanged as it relates to the affected landowners because the operative language relative to the issue affecting the landowners remained in the amended opinion. Consequently, it is important that this Court remedy the shortfall of the Eighth Circuit and give due consideration, regard and weight to the position of the landowners affected by the amended *Podhradsky* decision.

2. Effects of the litigation on the landowners.

The status of certain lands in Charles Mix County have been the subject of litigation for numerous years, but the most intense and, perhaps, the most damaging litigation has been during the past 15 years. The intense litigation began in 1994 when the

YST sued Southern Missouri Waste Management District. *See*, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 890 F.Supp. 878 (D.S.D. 1995). The trial court and the Eighth Circuit resurrected the old 1858 reservation boundaries, and changed over 100 years of the understanding and expectations of the citizens in Charles Mix County. These decisions, however, were reversed by the United States Supreme Court in a unanimous decision in the *Yankton* case. The *Yankton* case appeared to resolve the disputes which involved the landowners' property and placed them back in the status quo with regard to their landowner rights and privileges under the law.

At the trial in this case, the landowners appeared to be, once again, in the sights of the YST and the USA with regard to certain claims and arguments.[3] The arguments advanced by the USA and YST at trial were clearly contrary to the governing law, but, nonetheless, placed the landowners in a precarious situation with regard to their property rights and privileges as protected by and afforded to them under the United States and South Dakota Constitutions.

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[3] At the second trial YST and the USA argued, among other claims, that 25 U.S.C. § 398d (1927 Act) and/or the Indian Reorganization Act of 1934, 25 U.S.C. §§ 2 and 4 (1934 Act) froze the reservation boundaries. The YST and the USA argued that as a consequence of the 1927 and 1934 Acts certain lands must be considered to remain within the boundaries of the Yankton Sioux Reservation. Even the Trial Court and Eighth Circuit rejected these arguments

If these arguments were to prevail, many of the landowners' rights and privileges associated with their lands would be destroyed. At trial, no evidence was presented, nor any claims or arguments made by any parties, that lands acquired by non-Indian persons from Indian persons after June 25, 1948, should be granted reservation status.

The trial court decision did not mention, nor did it attach any significance to the June 25, 1948, date with regard to the creation of reservation lands. Consequently, the landowners' rights and privileges appeared to remain intact, as contemplated by the *Yankton* decision and the long line of decisions prior thereto from this Court and the South Dakota Supreme Court.

The landowners' enjoyment of their rights and privileges, however, was short lived. The Eighth Circuit heard and considered arguments, but none of the arguments asserted by the parties attached any significance to land acquisitions in relation to the date of the enactment of 18 U.S.C. § 1151. In spite of the lack of a factual record and legal arguments, a decision was rendered which was unsupported from a factual and legal standpoint. The *Podhradsky* decision is particularly unsettling in light of the unprecedented significance attached to the differentiation of the rights of landowners by virtue of the date of the acquisition of their property. The *Podhradsky* decision placed reservation boundaries around fee land owned by non-Indian persons simply based upon the time in which the land was acquired. Moreover, the decision

created mini reservations throughout Charles Mix County and thereby created an impossible situation for the businesses and landowners in the affected area.

Since *Yankton*, the landowners have been required to endure repeated legal assaults by the YST and the USA on their rights and efforts to enjoy their property in peace and tranquility. While the *Yankton* decision appeared to resolve the differences of the citizens in Charles Mix County, repeated efforts by the YST and the USA and the strained rationale of the Eighth Circuit in *Podhradsky* and other Indian law cases, have kept the litigation alive and thriving to this date. *See*, State of South Dakota's Petition for Writ of Certiorari, Statement of the Case, at 5-16; and Charles Mix County's Petition for Writ of Certiorari, Statement of the Case, at 10-16. Moreover, if the rationale of the amended opinion in *Podhradsky* is left to stand, many of the landowners' rights and privileges associated with their property will be destroyed.

3. Adverse alteration of the status quo.

The adverse alteration of the status quo and the rights of the landowners in the affected area of Charles Mix County are exemplified by the following:

a) Landowner rights.

A landowner's safe harbor for himself and his family is his home and, in rural America, his land.

This means that one can always take solace in the fact that when he is on his property, his rights are paramount and protected by the United States Constitution, the South Dakota Constitution and the body of laws enacted pursuant thereto. Ownership and possession of the land governs and dictates the rights one has related thereto and the fashion in which his rights may be asserted and protected. Part of these rights include the right to exclude whomever a landowner desires from his property. This would no longer be the case with regard to the affected landowners if *Podhradsky* is not reversed. *Podhradsky* places reservation boundaries around fee lands that are owned by non-Indian persons and arguably subjects them to laws and regulations by a sovereign nation that is foreign to them and which has no ownership interest in their lands. Moreover, the landowners would be subject to a tribal government in which they are prohibited from voting or otherwise voicing their opinions on other governing matters. Unlike laws that are enacted by the USA or South Dakota, the landowners have no right to be involved in the process of enacting the very laws, rules and regulations that will directly affect their lives, nor will they have the right to be involved in the enforcement process associated with said laws.

As an example of the absurd situation created by the *Podhradsky* decision, one merely needs to examine something as common as zoning. Charles Mix County does not have a zoning ordinance and a landowner can construct a livestock confinement unit

(LCU) on his property so long as he complies with South Dakota law. This is not the case with the affected landowners here. If the affected landowners desire to construct an LCU on their property, which is now a reservation, they must arguably comply with any zoning ordinance enacted by the YST. Further, they must arguably comply with the YST's Tribal Employment Rights Ordinance (TERO) and its ordinances governing the operation of a business on reservation lands. This means that not only will the affected landowner be required to pay a TERO tax on his operations, but he will be required to purchase a business permit or license from the YST. Moreover, given the attitude and actions of the BIA and the YST since *Podhradsky* as discussed herein, it is entirely likely that the YST will treat the landowners on the affected property differently and more harshly than an Indian person who is similarly situated. The harsh reality of the *Podhradsky* decision is that it will be used to permit the YST to control the use, ownership and occupation of land when it does not own the land, does not have any trust or leasehold interest in same, and has not contributed to the acquisition or maintenance of the land in any regard. This is absurd, an abomination, and most definitely contrary to generally accepted property law concepts.

In addition, many of the affected landowners currently engage in business on their property. In light of *Podhradsky*, the YST arguably will be in the position to require the affected landowners to either pay a TERO tax or secure a business permit or license to

continue to engage their businesses on their own property even if they do not modify or expand their operations in any regard. Moreover, the landowners could be subjected to taxation and fees to be imposed by the YST and they have no right to challenge or contest the assessment of these taxes and fees in any court of competent jurisdiction.

b) Criminal jurisdiction.

Criminal jurisdiction on the affected land will change dramatically under *Podhradsky*. After the District Court recognized the 1858 boundaries of the YST Indian reservation in 1995, local law enforcement officials met with tribal and federal officials to discuss jurisdictional issues and the logistics associated therewith. At this meeting, an Assistant U.S. Attorney made the comment that jurisdiction is not subject to debate, the agreement of the parties, or other principles, as a governmental entity either has jurisdiction or it does not. This is true. *Podhradsky* gives to the YST criminal jurisdiction over the affected lands – period. No amount of discussion or legal manipulation can change this. Consequently, if a crime is committed on the post-1948 reservation lands, the landowner will no longer call the Charles Mix County Sheriff to respond to crimes, but will be required to call BIA or YST officers. Moreover, while the race of the perpetrator or victim can affect criminal jurisdiction on reservation lands, the initial response will be by BIA or YST officers since there is no cross deputization in Charles Mix County and

these are reservation lands under *Podhradsky*. An additional problem that surfaces with the post-1948 reservation lands is that very little of the land is contiguous. Consequently, the BIA and YST officers will be required to travel long distances to cover their new jurisdiction. As a practical matter, this renders law enforcement a virtual nullity.

Further, the exact lands which are part of the post-1948 reservation are virtually unknown to law enforcement officers. Consequently, officers will be hampered by making decisions as to the status of the lands from which the emergency call originated prior to responding to the calls. This delay will allow perpetrators to continue their crimes or avoid apprehension. Protection from criminal activity and the punishment for the convicted criminal under *Podhradsky* will be chaotic at best. Furthermore, the hostility between the BIA and YST and the landowners, as discussed herein, will certainly affect the inclination to provide adequate and efficient law enforcement services to the affected lands. This problem was addressed in the *Yankton* case and was part of the basis for the unanimous decision to overrule the Eighth Circuit and the District Court and alleviate the absurdity created by the decisions in those courts.

Regulation of hunting and fishing on the post-1948 reservation lands will also fall to the YST. The YST currently sells separate hunting licenses for tribal and reservation lands and provides enforcement of its hunting regulations. Persons who possess

a YST hunting license will be able to hunt the post-1948 reservation lands regardless of whether the landowner consents to said activity because the license gives them the right of access to these lands. Further, members of the YST are permitted to hunt and fish tribal and reservation lands, including the post-1948 reservation lands, without first obtaining the permission of the landowner. Clearly, the affected landowners will not be able to control who has access to their property for purposes of hunting and fishing. More importantly, it is quite possible that the YST could require a landowner to purchase a YST hunting license to hunt his own land since the property that he owns is reservation under *Podhradsky*.

c) Insurance and marketability issues.

The ability of the YST to have unfettered access and control of the hunting and fishing on the post-1948 reservation lands certainly affects the insurability of the landowner and his property. It is common knowledge that insurance companies rely primarily on risk assessment in order to hedge their position in a transaction and make a profit. In short, the greater the risk, the higher the premium to be charged to an insured. If a landowner cannot control access to his property for purposes of hunting, fishing or other activities, he certainly will be subjected to either increased premiums or cancellation of his insurance coverage. If insurance is unaffordable or unavailable due to risk factors beyond the landowner's control, the landowner will be exposed to personal liability in

the event of an injury as a result of an activity on his property. Further, if he has no insurance, he stands to lose his home, business and other assets in order to satisfy a damage claim.

In light of the post-1948 reservations created by the *Podhradsky* decision, the marketability of the landowners' property will also be adversely affected. This has an impact upon the landowner, or his heirs, if a decision is made to sell the property. It also has an impact on the use of the property for collateral in banking transactions.

Two key elements exist in any sale transaction involving real property. First, the seller wants to be able to market his land based upon what it has to offer prospective purchasers. Second, the purchaser wants to purchase real property that he can use either as a business/investment endeavor or for recreation. Land prices in Charles Mix County have risen dramatically over the past several years, largely due to hunters who desire to secure a place to hunt during South Dakota's excellent hunting seasons. If many people have access to the land for hunting purposes and that access cannot be controlled by the owner of the property, its marketability from a hunting standpoint is reduced if not completely eliminated. If the property cannot be insured due to the unlimited access of others to the property or the control of same by the YST, then the marketability of the property is, once again, severely hampered or completely eliminated. If landowners cannot control the access to their property so as to protect their

crops, livestock and land, the marketability of the property from an agricultural standpoint is substantially reduced as well.

In addition, financial institutions base the amount of a loan upon the value of the collateral. The value of the collateral is based directly upon the ability to sell same in the event of a default on the note. If the marketability of the property is adversely affected due to its status as reservation land, the financial institution will not loan money, or as much money, as it might have otherwise loaned had the reservation impediment not been present.

B. Discriminatory effect of *Podhradsky*.[4]

Under federal and state law CME and RCWD are obligated to refrain from discriminatory rate practices in the operation of their businesses. The entities are permitted to discriminate between classes on their rates, but cannot discriminate within a class. Consequently, the same rate must be charged to a class of consumers, whether Indian or non-Indian, regardless of where the services are provided. Moreover, the ability of the YST to tax the entities and control rates, govern enforcement actions, and, to a certain degree, control other aspects of the operation of

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[4] A detailed discussion of the history and financial obligations of CME is contained in the *Amicus Curiae* Brief of Charles Mix Electric Association, Inc and Rosebud Electric Cooperative, Inc.

utility companies is directly tied to the status of the land. If the issue involving the mini reservations and the post-1948 reservation lands created by *Podhradsky* is not reversed on appeal, it will certainly have a discriminatory effect on the landowners.

Currently, the YST does not have an ordinance governing utilities, but, in light of *Podhradsky*, it is merely a matter of time before such an ordinance will be enacted. Other Indian tribes have already enacted ordinances to regulate utilities and it is clear that a trend has been established among the tribes to enact these ordinances. *See*, *Amicus Curiae* Brief of Charles Mix Electric Association, Inc., and Rosebud Electric Cooperative, Inc., at 5, n. 5. The current governing law arguably permits the YST to engage in regulatory actions over CME and RCWD on the mini reservation lands and the post-1948 reservation lands. *See*, *Montana*, 450 U.S. at 544; *Strate v. A-1 Contractors*, 520 U.S. at 438; *Plains Commerce Bank*, 554 U.S. at 316. Consequently, the YST could require the utility provider to charge a lower rate to the Indian person who resides on the mini reservation lands than other consumers who receive the exact same services. Moreover, the YST can govern the termination of services for the Indian consumer on the mini reservation lands under its ordinances and can do so in a fashion that is different in nature and manner than what applies to other utility consumers.

In addition, CME and RCWD have financing for infrastructure and other improvements which are directly tied to their rates. Consequently, if their

rates fall below a certain level, they will be considered in default of their loans and same could be foreclosed or their operations could be taken over by their funding agency. *See, Amicus Curiae* Brief of Charles Mix Electric Association, Inc., and Rosebud Electric Cooperative, Inc., at. 2-5. If the YST requires the utility providers to impose rates on the mini reservation lands that are less than that which are charged to other consumers, then the utility providers will necessarily be required to increase their rates to the other users so that they can meet their obligations under the financial agreements. The net effect is that the Indian consumers who reside on the mini reservation lands will enjoy an inordinately low utility rate while the other users' utility rates will skyrocket. This affects all of the CME and RCWD consumers and not simply the consumers who reside in the area affected by *Podhradsky*.

In addition to the above, the Wagner School District is situated on post-1948 reservation land. The school has in place certain disciplinary measures and other rules and regulations to govern not only the students at its facilities, but the staff as well. Since the school facilities are now located on a reservation under *Podhradsky* the complexion of the discipline and other controls at the Wagner School System will change dramatically. Clearly, non-Indian students will be treated differently than Indian students in light of the jurisdictional issues associated with reservation lands. The landowners will now be in a position where not only will their businesses, property

rights and other interests be directly affected by the *Podhradsky* decision, but also their children's lives will be dramatically, and perhaps adversely, impacted in an educational setting.

C. Conflicts of the decisions.

The Petitions for Writ Certiorari submitted by the State of South Dakota, Charles Mix County and Southern Missouri Recycling and Waste Management District clearly set forth the conflicts which exist with the *Podhradsky* decision and other decisions rendered by the South Dakota Supreme Court, the Eighth Circuit, and this Court. *Podhradsky* is in direct conflict with at least two South Dakota Supreme Court cases. *See, State v. Greger*, 559 N.W.2d 854 (S.D. 1997) and *Bruguier*, 599 N.W.2d at 364. Moreover, *Podhradsky* leaves a clear conflict with the decisions rendered by the Eighth Circuit as well. In the first instance, if the language in *Podhradsky* were eliminated regarding the affected non-Indian landowners who acquired their property post-1948, there would be no conflict with *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999), nor with the recent decision in *Yankton Sioux Tribe v. United States Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010), but there would remain a conflict as a result of the creation of reservations regarding the lands held in trust. On the other hand, if *Podhradsky* stands, it will clearly be in conflict with the *Gaffey* and the *Corps of Engineers* decisions with reference to the post-1948 lands as well as the trust lands.

The *Podhradsky* decision is also in conflict with this Court's decisions in *Yankton* and in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), with regard to a number of issues, but primarily in reference to the extinguishment of the boundaries of the 1858 YST reservation. This Court declined to fully resolve the boundary issue in *Yankton*. That issue is now ripe and should be decided by this Court.

CONCLUSION

The *amicus curiae* landowners request the United States Supreme Court grant the Petitions for Writ of Certiorari filed by the State of South Dakota, Charles Mix County and Southern Missouri Recycling and Waste Management District.

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Respectfully submitted,

TIMOTHY R. WHALEN
WHALEN LAW OFFICE, P.C.
301 Main Street
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
Email: whalawtim@cme.coop

Attorney for Amicus Curiae Colin Soukup, representing the Frank Soukup Family Limited Partnership, and Dan Cimpl